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REWARDING EMPLOYERS' LIES: MAKING INTENTIONAL DISCRIMINATION UNDER TITLE VII HARDER TO PROVE*

America is far better for honoring our commitment to the fundamental principle that all are created equal, that everyone is entitled to the opportunity to compete for jobs for which they qualify, to gain those qualifications through education, to travel, to use public accommodations and to live wherever they can afford.¹

I. INTRODUCTION

While the quotation above is in keeping with the spirit of the Civil Rights Act of 1964² — designed to eliminate employment discrimination based on “race, color, religion, sex, or national origin”³ — the recent Supreme Court decision in *St. Mary's Honor Center v. Hicks*⁴ leaves one wondering if these goals are truly obtainable.⁵ The 5-4 decision, written by Justice Scalia, makes intentional discrimination in the workplace more difficult to prove.⁶ At least one

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1. *Speech by EEOC Chairman Kemp at National Press Club, Nov. 24, 1991*, Daily Lab. Rep. (BNA) No. 228, at D1 (Nov. 25, 1992).

2. 42 USC §§ 2000(e)-2(a)(1) (1991).

3. *Id.*

4. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993).

5. *See A Step Backward*, THE ETHNIC NEWSWATCH BAY STATE BANNER, July 8, 1993, at 4 (suggesting that the principles of freedom are significantly undermined by the decision in cases such as *St. Mary's* and suggesting that a majority of the Supreme Court no longer considers racial discrimination and oppression to be serious issues). “What is most troubling about these decisions is the court’s cavalier disregard of precedent and the fanciful notion that ‘race no longer matters.’ Our entire history as nation, and in the law in particular, centers on the fact that race matters dearly.” *Lawyers’ Committee for Civil Rights Under Law Finds Recent Supreme Court Rulings Pernicious and Untenable*, U.S. NEWSWIRE, July 1, 1993, available in LEXIS, News Library, Curnws File (quoting Barbara Arnwine, the Executive Director of the Committee).

6. Linda Greenhouse, *Overview of the Term: The Court’s Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, § 4, at 1. *But see* Richard A. Samp, *Intent Is Needed for Workplace Bias*, THE NAT’L L.J., June 14, 1993, at 15 (stating that the Court’s decision serves to ensure that employers will not be found liable unless that employee can prove that the employer intentionally discriminated); Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Petitioners, *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742

commentator has suggested that this decision is a part of a "counterrevolution" by the Court resulting from the loss of Thurgood Marshall and the appointment of Justices O'Connor, Scalia, Thomas, and Souter under Presidents Reagan and Bush.⁷

Whether a part of a larger counterrevolution or not, there is little doubt that the issue of employment discrimination continues to be at the forefront of politics.⁸ At the Senate Confirmation Hearings held in July of 1993, Senator Orrin Hatch questioned Supreme Court nominee Ruth Ginsburg about her own employment practices.⁹ Despite having hired over fifty employees, Justice Ginsburg had not hired any African-American applicants to serve as law clerks in the thirteen years that she was a judge in Washington D.C.¹⁰ It is of little surprise to see questioning of the Justice from Congress on this issue. Congress has often expressed its disagreement with the Court in its interpretation of Civil Rights laws by passing legislation overruling the Court's decisions.¹¹ In fact, the Court's most recent decision has already come under Congressional attack.¹² Within days of the *St. Mary's* decision, Senator Howard Metzenbaum sent a letter

(1993) (No. 92-602), available in LEXIS, Genfed Library, Briefs File (discussing the necessity of the Supreme Court's decision so as to avoid making all "errors in managerial discretion" on the part of the employer violative of Title VII).

7. Greenhouse, *supra* note 6 (describing the Court as "poised on the threshold of change"); see also Herman Schwartz, *The Court's Right Is Still Mighty*, N.J. L.J., Aug. 23, 1993 at 4 (describing the Supreme Court as having a "solid conservative majority" whose "hard-shell conservatism" with at times a "more moderate variety" has dominated the Supreme Court).

8. See *infra* notes 9-11 and accompanying text (discussing the questioning of Judge Ginsburg during the Senate Confirmation Hearings); see also *infra* notes 12-14 and accompanying text (noting the swift response of Congress in introducing a bill to overturn the Supreme Court's most recent interpretation of Title VII of the Civil Rights Act).

9. The Senator asked if statistical evidence alone showing minority underrepresentation would be enough to create an inference of discrimination and if the employer was therefore justified in using quotas or other racial preferences to eliminate the imbalance. *Afternoon Session of the Senate Judiciary Committee Hearing*, Fed. News Serv., July 20, 1993, available in LEXIS, Legnew Library, Nominee file; see *Judge Ginsburg's Employment Practices*, WASH. TIMES, July 27, 1993, at F2 (criticizing Judge Ginsburg's approach to questions asked by the Senate regarding her stance on the employment discrimination issue).

10. *Judge Ginsburg's Employment Practices*, *supra* note 9.

11. The Civil Rights Act of 1990 was intended to reverse five Supreme Court decisions rendered in 1989. JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., *CASES AND MATERIALS ON THE LAW OF EMPLOYMENT DISCRIMINATION* 243-44 (3d ed. 1993). This Act was vetoed by President Bush. *Id.* at 244. The Civil Rights Amendment of 1991 targeted these same five decisions. *Id.*; see Susan Ritz, *INTRODUCTION TO THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION* 9 (1992) (describing the Civil Rights Amendment of 1991 as aiming at "restoring many of the substantive rights and analytical frameworks that were gutted by the United States Supreme Court").

12. *Sen. Metzenbaum to Push Legislation to Void Supreme Court's Bias Decision*, Daily Lab. Rep. (BNA) No. 129, at D-6 (July 8, 1993).

to his colleagues asking them to join with him in sponsoring legislation to overturn the decision.¹³ Within weeks, two bills were introduced in the House; either of which, if passed, will effectively overrule the Court's most recent interpretation of the Civil Rights Act.¹⁴

This Note discusses the impact of the *St. Mary's* decision on an employee's ability to win Title VII suits. Section I traces the history of the Supreme Court's interpretation of the Civil Rights Act of 1964 and explains the various types of cases which may be brought under the Act. Special attention is paid to the allocation of the burden of proof in cases brought by employees alleging intentional discrimination and the difficulty that the appellate courts had in interpreting the standards for the allocation as set out by the Supreme Court prior to the *St. Mary's* decision.

Section II of this Note discusses the *St. Mary's* decision, detailing both Justice Scalia's majority opinion as well as Justice Souter's dissent. Section III analyzes Justice Scalia's majority opinion in lieu of Federal Rule of Evidence 301 and the purpose behind the Civil Rights Act, concentrating on the evidence needed by the plaintiff in establishing discriminatory intent. Finally, Section IV discusses the impact that the Court's decision will have on the number of suits filed, the cost of litigating claims, and the eradication of discrimination in the workplace.

II. BACKGROUND

A. Types of Cases Brought Under Title VII

Title VII of the Civil Rights Act of 1964 renders it unlawful for an employer with fifteen or more employees, engaged in an industry which affects commerce to discriminate against an individual based on that individual's race, color, sex, religion, or national origin.¹⁵

13. *Id.*

14. H.R. 2787, 103d Cong., 1st Sess. (1993); H.R. 2867, 103d Cong., 1st Sess. (1993).

15. The text of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 provides in Section 703(a):

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The statutory prohibition against discrimination also applies to employment agencies and labor organizations.¹⁶ Title VII was the first comprehensive federal statute to prohibit discrimination in the private workplace.¹⁷ Its primary purpose is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."¹⁸ In response to the complexity of Title VII, the courts have developed two principal doctrines to aid in its application — disparate impact and disparate treatment.¹⁹ Generally, in a disparate impact case, the plaintiff challenges the use of a subjective or objective employment practice which has the effect of excluding a disproportionate number of applicants, potential applicants, or employees protected by Title

42 U.S.C. § 2000e-2(a)(1), (2) (1991).

16. Sections 703(b)&(c) provide, *inter alia*, that an employment agency cannot refuse to refer for employment any individual based on race, sex, color, religion or national origin and that a labor organization cannot exclude from its membership based on these five characteristics. 42 U.S.C. § 2000e-2(b)(c) (1991); *see, e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 328 (1977) (alleging that a labor union violated Title VII "by agreeing with the employer to create and maintain a seniority system that perpetuated the effects of past racial and ethnic discrimination").

17. *FRIEDMAN & STRICKLER*, *supra* note 11, at 28 n.a (describing the Civil Rights Act of 1964 as an "omnibus" statute).

18. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). The Supreme Court noted: Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 800-01 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

19. *LEE MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES 3* (1980); *see International Bhd. of Teamsters*, 431 U.S. at 335 n.15 (defining the theories); *see also* Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Serv. Bd. of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1203 (1982) (comparing the disparate treatment and disparate impact doctrines); Candace S. Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance*, 39 AM. U. L. REV. 615, 635-65 (1990) (distinguishing the two doctrines with respect to their allocations of proof).

Supreme Court Justice Marshall wrote:

It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. An individual may allege that he has been subject to "disparate treatment" because of his race, or that he has been the victim of a facially neutral practice having a "disparate impact" on his racial group.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring in part) (citations omitted).

VII.²⁰ Disparate treatment cases, on the other hand, generally focus on the employer's motivation; the plaintiff seeks to prove that his employer has intentionally discriminated against him due to his sex, race, religion, color or national origin.²¹

The Supreme Court has established three models of proof under which Title VII litigation may be raised and analyzed:²² 1) the individual disparate treatment model,²³ 2) a class disparate treatment model,²⁴ or 3) the disproportionate impact model.²⁵ Each of these

20. FRIEDMAN & STRICKLER, *supra* note 11, at 196. In *Griggs*, the Supreme Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (describing the use of the disparate impact theory to subjective employment criteria).

"[D]isparate impact' refers to a situation in which employer action, although facially neutral, places one group at a disadvantage relative to another group." Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 801 (1985) (citing Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 40 (1977)). The theory behind disparate impact cases is that neutral practices may be used to perpetuate past discrimination. Constance B. Motley, *The Supreme Court, Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV. 643, 651 (1991). Therefore, if the employer cannot justify the use of the practice for business reasons, the practice should not be used. *Id.* Prior to the enactment of the Civil Rights Act of 1991, there was considerable debate over how disproportionate practices on a protected group related to discrimination. See Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 524 (1991) (discussing the debate over "the relationship between discrimination against a protected group and evidence that members of that group are disproportionately excluded from an opportunity or benefit"). The proper use of statistics as proof of discriminatory intent in disparate treatment cases has also been debated. See Julia Lamber, et al., *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 582-84 (1983) (describing the ways in which statistics may be used in disparate treatment cases).

21. FRIEDMAN & STRICKLER, *supra* note 11, at 93. Disparate treatment has been described as the "most easily recognized form of discrimination." *Id.*; see, e.g., Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1111-19 (1991) (describing disparate treatment and the methods used to prove it); see also D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 734, 772-82 (1987) (arguing that courts should examine an employer's motive, instead of his intent, when analyzing a disparate treatment claim).

22. FRIEDMAN & STRICKLER, *supra* note 11, at 297. For a discussion of the Court's initial decisions regarding the burden of proof in both disparate impact and disparate treatment claims, see O'Neal Smalls, *The Burden of Proof in Title VII Cases*, 25 HOW. L.J. 247, 249-67 (1982).

23. For a definition of disparate treatment, see *supra* note 21 and accompanying text.

24. Class disparate treatment cases are also referred to as "pattern and practice" cases. FRIEDMAN & STRICKLER, *supra* note 11, at 297; see *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 328 (1977) (alleging that the employer had engaged in a "pattern and practice" of employment discrimination against African-Americans and Spanish-surnamed individuals); see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301 (1977) (alleging that the employer engaged a "pattern or practice" which intentionally discriminated against a class of qualified African-American faculty members). The difference between an individual disparate treatment claim and a class action pattern and practice claim is at the liability stage. *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984). In the individual's claim, the focus is on a specific hiring deci-

models has a distinct allocation of proof — although they are not mutually exclusive.²⁶ Thus, a plaintiff is free to allege that the employer violated any or all of them.²⁷ As the Court's decision in *St. Mary's* directly impacts the burden of proof in disparate treatment cases, a brief historical overview of the development of the allocation of proof is necessary.

sion, whereas in the class action suit, the focus is on an established pattern of discriminatory decision-making. *Id.* (citing *International Bhd. of Teamsters*, 431 U.S. at 336).

25. For a definition of disparate impact, see *supra* note 20 and accompanying text.

26. FRIEDMAN & STRICKLER, *supra* note 11, at 297. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court first acknowledged the existence of the disparate impact case. The Court stated, "good intent or absence of discrimination does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432. Later in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court affirmed the *Griggs* standard for the *prima facie* case of disparate impact, *i.e.*, that the plaintiff establish that a neutral practice has a disparate impact on a protected group. *Id.* at 425. The Court held that the plaintiff has the initial burden of establishing a *prima facie* case which proves that the employer's policy or practice disproportionately impacts members of a protected class. *Id.* (citation omitted). The burden then shifts to the employer to prove that the practice is "job related" or has a manifest relationship to his business. *Id.* (citation omitted). Finally, the plaintiff must show that there are other alternatives to the employer's practice which do not have a disproportionate impact, but would serve the employer's legitimate goals. *Id.* (citation omitted). Congress actually codified this allocation of proof in Section 105 of the Civil Rights Act of 1991. This section states in relevant part:

An unlawful employment practice based on disparate impact is established under this Title only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C.A. § 2000e-2(k)(1)(A) (West Supp. 1994).

With respect to class disparate treatment or pattern and practice claims, the plaintiff is initially required to establish by a preponderance of the evidence that discrimination against a protected group was the standard operating procedure of the employer. *International Bhd. of Teamsters*, 431 U.S. at 336, 360. If the employee meets this standard, the burden then shifts to the employer to rebut the inference of discrimination. *Id.* at 360. For a discussion of the allocation of proof in disparate treatment claims, see *infra* notes 37-41 and accompanying text.

27. FRIEDMAN & STRICKLER, *supra* note 11, at 297; see, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 648 (1989) (alleging that the employer violated Title VII under both class disparate treatment and disparate impact theories); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 983 (1988) (alleging the employer violated Title VII under both disparate impact and disparate treatment theories).

B. The Burden of Proof for Private Non-Class Disparate Treatment Cases

1. McDonnell Douglas and its Progeny

The Supreme Court first confronted intentional discrimination, following the passage of the Civil Rights Act of 1964, in the case of *McDonnell Douglas Corp. v. Green*.²⁸ In *McDonnell Douglas*, an African-American mechanic had been laid off as part of the general reduction in the employer's work force.²⁹ The employee alleged that both this action and the employer's general hiring practices were racially motivated.³⁰ As part of his protest to these actions, the mechanic participated in a "stall-in" in which he and other members of a Civil Rights group intentionally stalled their cars on the main roads to the employer's plant, effectively blocking all access during the morning shift change.³¹ Shortly after the "stall-in," the employer publicly advertised for qualified mechanics and Green applied for rehire.³² The employer stated that he refused to hire Green because of his involvement in the "stall-in."³³ Green then filed suit alleging that the employer had failed to rehire him both because of his race and because of his participation in civil rights activities in violation of §§ 703(a)(1)³⁴ and 704(a)³⁵ of the Civil Rights Act of 1964.³⁶

In its opinion, the Court held that in a Title VII case, the employee must carry the initial burden of persuasion by establishing a *prima facie* case of racial discrimination.³⁷ The Court said a *prima facie* case "may"³⁸ be established if the employee establishes:

28. 411 U.S. 792 (1973).

29. *Id.* at 794.

30. *Id.*

31. *Id.*

32. *Id.* at 796.

33. The employer also alleged that Green participated in another separate illegal incident. During this incident, a padlock was placed on the employer's front door thus preventing certain employees from leaving. Although Green knew of the incident before it transpired, the extent of his involvement was unclear. *Id.* at 795.

34. For the text of Section 703(a)(1), see *supra* note 15.

35. Section 704 provides that, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a) (1991).

36. *McDonnell Douglas*, 411 U.S. at 796.

37. *Id.* at 802.

38. The Court specifically noted that the elements of the test may vary according to the factual situation. *Id.* at 802 n.13. For a discussion of the various adaptations of the *prima facie* case in

(i) that he [is a member of a protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants [with similar] qualifications.³⁹

After the employee has established a *prima facie* case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."⁴⁰ Finally, the Court recognized that the employee must be given a "fair opportunity" to show the employer's reason was in fact a pretext for unlawful discrimination.⁴¹ The Court remanded the case to the lower court to give the employee the opportunity to show that the employer's stated reason for the employee's rejection was a pretext.⁴² The Court stated that, "[e]specially relevant to such a showing would be evidence that white employees involved in acts against petitioner [employer] of comparable seriousness to the 'stall-in' were nevertheless retained or rehired."⁴³ The Court also suggested that other evidence such as the way the employer had treated the employee while he was employed, if the employer had any reactions to the employee's participation in legitimate civil rights activities, and the employer's "general policy and practice with respect to minority employment" may be relevant to showing pretext.⁴⁴ The Court found that statistics could be helpful to determine "whether [the employer's] refusal to rehire respondent [employee] . . . conformed to a general pattern of discrimination against blacks."⁴⁵

different factual scenarios, see Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies,"* 68 WASH. L. REV. 477, 513 n.121 (1993). Not only have the elements of this test been adapted to accommodate the factual situations of other Title VII cases, the test has also been used to establish *prima facie* cases under a variety of other federal statutes with prohibitions against discrimination. See Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 59, 62 n.14 (1991) (noting that the four elements of the *prima facie* case have been applied in cases alleging violations of the Age Discrimination in Employment Act, Employee Retirement Investment Security Act, and Civil Rights Act of 1866).

39. *McDonnell Douglas*, 411 U.S. at 802.

40. *Id.*

41. *Id.* at 804.

42. *Id.* The Supreme Court has used this type of allocation of proof in other contexts. See e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (establishing a similar allocation of proof in the process of jury selection). For a discussion of the similarities between the allocation of proof in jury selection and employment discrimination cases, see *infra* notes 311-14.

43. *Id.*

44. *Id.* at 804-05.

45. *Id.*

This first attempt to clarify the allocation of the burden of proof left many questions unresolved.⁴⁶ Specifically, the Court's requirement that after the plaintiff establishes a *prima facie* case, the burden must shift to the employer to "articulate" some legitimate reason for its action.⁴⁷ Disagreement arose among the lower courts as to the precise nature of the employer's burden.⁴⁸ Some courts held that the employer need only to produce evidence of a legitimate, nondiscriminatory reason;⁴⁹ while others held that after a *prima facie* case is established, the burden of persuasion shifts to the employer who therefore had to prove by a preponderance of evidence the existence of a legitimate, nondiscriminatory reason.⁵⁰

In two decisions in 1978, the Court failed to resolve the dispute regarding the allocation of the burden at the second stage.⁵¹ In *Furnco Construction Corporation v. Waters*,⁵² the Court held that under *McDonnell Douglas*,

it is apparent that the burden which shifts to the [defendant] is merely that of proving that he based his . . . decision on a legitimate consideration To dispel the adverse inference from a *prima facie* [case] under *McDonnell Douglas*, the [defendant] need only 'articulate some legitimate, nondiscriminatory reason' [for the action taken].⁵³

In a decision rendered a few months later, the Court acknowledged that its use of the words "prove" and "articulate" in describing the employer's burden in *Furnco* confused the issue.⁵⁴ In its decision in

46. See FRIEDMAN & STRICKLER, *supra* note 11, at 99-100 (describing the confusion which resulted in the lower courts as a result of this decision over issues such as the kind of *prima facie* showing a plaintiff must present to be considered "qualified").

47. Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1237 (1981).

48. *Id.*

49. See, e.g., *Barnes v. St. Catherine's Hosp.*, 563 F.2d 324, 329 (7th Cir. 1977) (stating "[w]e think it sufficient to note that the hospital [employer] introduced competent evidence tending to prove that Mrs. Barnes [employee] was terminated because of her insubordination [a legitimate, nondiscriminatory reason]"); *Sabot v. Snyder*, 524 F.2d 1009, 1012 (10th Cir. 1975) (finding that once the *prima facie* case is established, it "is incumbent on the defendant to articulate some legitimate, nondiscriminatory reason" for the defendant's action).

50. Belton, *supra* note 47 (discussing the difference between the "articulate" and "prove" methods of the court); see, e.g., *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977) (adopting the view that the employer bears the burden of proving the legitimate, nondiscriminatory reasons for his actions by a preponderance of the evidence in Title VII actions).

51. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

52. 438 U.S. 567 (1978).

53. *Id.* at 577-78 (citation omitted).

54. *Board of Trustees of Keene State College*, 439 U.S. at 25 (discussing the confusion surrounding the Court's use of both of the words "proof" and "articulate" as defining the defendant's

Texas Department of Community Affairs v. Burdine,⁵⁵ the Court made a final attempt at clarifying the precise burden at the second stage of the triumvirate formula established in *McDonnell Douglas*.⁵⁶

2. *The Burdine Decision and Its Progeny*

In *Burdine*, the plaintiff, a female employee, filed suit against her employer alleging that the employer's failure to promote her and its decision to terminate her were based on gender considerations.⁵⁷ The plaintiff worked as a Field Services Coordinator in the Public Services Careers Division ("PSC") of the Texas Department of Community Affairs ("TDCA").⁵⁸ Shortly after her supervisor resigned in November of 1972, the plaintiff applied for the position of project director.⁵⁹ Six months later, at the request of the United States Department of Labor, TDCA hired a project director.⁶⁰ Despite the fact that the plaintiff had maintained her application for the position, the TDCA hired a male employee from another division for the position.⁶¹ As part of a reduction in staff, the plaintiff and two others were terminated.⁶²

The district court found that neither the employer's failure to promote nor its decision to fire the plaintiff was based on gender.⁶³ The employer stated that the decision not to promote the plaintiff was based on the nondiscriminatory assessment of each candidate's relevant qualifications and that the decision to fire was based on a finding that the three individuals who were terminated did not work well together.⁶⁴ The district court held that the reasons were ra-

burden in *Furnco*).

55. 450 U.S. 248 (1980).

56. For a discussion of the evidentiary triumvirate as articulated by the Court in *McDonnell Douglas*, see *supra* notes 37-41 and accompanying text.

57. *Burdine*, 450 U.S. at 251.

58. *Id.* at 250.

59. *Id.*

60. PSC was being funded completely by the Department of Labor. *Id.* The director of PSC was informed by the Department of Labor of its decision to terminate the division. *Id.* PSC convinced the Department to allow it to continue operating if it made some changes including the appointment of a permanent project director and complete staff re-organization. *Id.*

61. *Id.* at 250-51.

62. *Id.* at 251.

63. *Id.*

64. *Id.* The employer stated that TDCA believed that firing the three individuals would improve the division's efficiency. *Id.*

tional and did not evidence a discriminatory motive.⁶⁵

The appellate court affirmed in part, finding that the district court's "implicit evidentiary finding" that the man hired as project director was better qualified for the position was not clearly erroneous, and that the plaintiff was therefore not discriminated against when the employer failed to promote her.⁶⁶ However, the appellate court found that the employer had failed to sufficiently rebut the employee's *prima facie* case of gender discrimination in the employer's decision to terminate her employment.⁶⁷ The appellate court held that the employer "bears the burden of proving by a preponderance of the evidence" that nondiscriminatory reasons for the decision exist and must "prove by objective evidence that those hired or promoted were better qualified than the plaintiff."⁶⁸ The Supreme Court reversed.⁶⁹

In defining the allocation of the evidentiary burdens, the Court stated that establishing a *prima facie* case creates a presumption that the employer unlawfully discriminated.⁷⁰ The burden must then shift to the employer to rebut this presumption by raising a genuine issue of fact.⁷¹ "To accomplish this, the defendant [employer] must clearly set forth, through the introduction of admissible evidence, the reasons for the [employee's] rejection."⁷² However, the employer "need not persuade the court that it was actually motivated by the proffered reasons."⁷³ The Court went on to find that if the employer failed to offer any reason for his action, the employee would be entitled to judgment as a matter of law as no genuine issue of fact would be created.⁷⁴ Once the employer's burden had been satisfied, however, "the factual inquiry proceeds to a new level of specificity."⁷⁵ The burden "frame[s] the factual issue with sufficient clarity," to allow the employee to demonstrate pretext.⁷⁶ At the pretext stage, the employee must demonstrate that "the proffered reason

65. *Id.*

66. *Id.*

67. *Id.* at 250-52.

68. *Id.* at 252. The appellate court remanded the case in order for backpay to be computed. *Id.*

69. *Id.*

70. *Id.* at 252-53.

71. *Id.* at 253.

72. *Id.* at 255.

73. *Id.* at 254.

74. *Id.*

75. *Id.* at 255.

76. *Id.* at 255-56.

was not the true reason for the employment decision;" a burden which "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."⁷⁷ The employee may do this "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."⁷⁸

Prior to *Burdine*, the focus of the disagreement among lower courts revolved around the employer's burden at the second stage.⁷⁹ After *Burdine*, the focus shifted to the nature of the proof as a whole.⁸⁰ In *United States Postal Service Board of Governors v. Aikens*,⁸¹ the plaintiff, an African-American employee, filed a disparate treatment claim alleging that the United States Postal Service had discriminated against him by refusing to promote him on account of his race.⁸² The employer argued that the employee had failed to establish a *prima facie* case.⁸³ The Supreme Court dismissed this issue,⁸⁴ finding instead that the real inquiry revolved around the finding of the ultimate fact in the case: whether "the defendant [employer] intentionally discriminated against the plaintiff [employee]." ⁸⁵ The Court noted that an employee may prove his case either by direct or circumstantial evidence and that the trier of fact should consider all the evidence before it and attach to it whatever weight it may deserve.⁸⁶ "All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes. . . . The law [however] often obliges

77. *Id.* at 256.

78. *Id.*

79. See *supra* notes 48-50 and accompanying text (discussing the confusion that the appellate courts had over the defendant's burden at the second stage).

80. See *infra* notes 86-88 and accompanying text (discussing the Supreme Court's instruction to the lower court to consider the evidence as a whole in determining the existence of a discriminatory intent).

81. 460 U.S. 711 (1983).

82. *Id.* at 712.

83. *Id.* at 713.

84. The Court stated that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *Id.* at 715; see Bartholet, *supra* note 19 (discussing the ramifications of the decision had it been based on the *prima facie* case).

85. *Aikens*, 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 253).

86. *Id.* at 714 n.3.

finders of fact to inquire into a person's state of mind."⁸⁷ The Court then remanded the case to the district court for it to determine, based on all the evidence, whether the employer had intentionally discriminated against the employee.⁸⁸ In his concurring opinion, Justice Blackmun acknowledged that the employee retains the burden of proving pretext at the third stage.⁸⁹ Citing *Burdine*,⁹⁰ Justice Blackmun noted that the burden may be met by the employee either by persuading the court by a preponderance of the evidence that the employer's decision was motivated by discrimination or by showing "that the employer's proffered explanation is unworthy of credence."⁹¹ Thus, after the decisions in *Burdine* and *Aikens*, it appeared that an employee would be able to prove intentional discrimination, even absent direct evidence proving such intent.⁹² However, the appellate courts disagreed as to the proper application of the principles pronounced by the court and these decisions were not interpreted uniformly among the circuits.⁹³

3. *Interpreting the Decisions — the Plaintiff's Burden at the Third Stage*

Despite the language and opinions in both *Burdine* and *Aikens* suggesting that the plaintiff may proceed in the third stage by either direct or indirect proof, courts of appeals have interpreted these decisions differently.⁹⁴ After *Burdine*, many courts held that a plaintiff could prove pretext, and thus intentional discrimination, by showing that the employer's articulated reasons for the adverse employment decision are untrue.⁹⁵ Under this rule, which is known as the "pretext-only" rule, the plaintiff does not need to produce any additional evidence of discriminatory animus, as "the court may infer discriminatory intent from the fact that the defendant lied about its motivations."⁹⁶ A minority of the courts have adhered to what is known as

87. *Id.* at 716.

88. *Id.* at 717.

89. *Id.* (Blackmun, J., concurring).

90. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

91. *Aikens*, 460 U.S. at 717-18 (Blackmun, J., concurring) (quoting *Burdine*, 450 U.S. at 256).

92. *See supra* notes 86-92 (authorizing the use of circumstantial evidence to show the discriminatory intent of the employer).

93. *See, e.g.,* *Lanctot*, *supra* note 38, at 65-68 (discussing the difference between pretext and pretext-plus circuits).

94. *Id.*

95. *Id.* at 65.

96. *Id.*

the "pretext-plus" rule.⁹⁷ Under this rule, the fact that the plaintiff has shown that the employer's reasons are untrue is not enough.⁹⁸ Instead, "the plaintiff must produce some additional evidence to show not only that the employer has concealed some other reason by its pretextual explanation, but also that the reason concealed by the employer was *intentional discrimination*."⁹⁹ To complicate matters, jurisdictions are not always consistent in applying their rule of choice and thus "both the 'pretext-only' and the 'pretext-plus' rules seem to exist side by side."¹⁰⁰

a. Pretext-only decisions: examples from two circuits¹⁰¹

In its decision in *Williams v. Valentec Kisco, Inc.*,¹⁰² the Eighth Circuit specifically stated that "*Burdine* clearly does not support a pretext-plus approach."¹⁰³ In *Williams*, a fifty-one year old African-American man alleged that his employer had discriminated against him on the basis of race and age in terminating his employment and replacing him with a thirty year old man.¹⁰⁴ On appeal, the em-

97. *Id.*

98. *Id.*

99. *Id.* at 66 (emphasis in original).

100. *Id.* at 67, 72-73 nn.48-49, & 85-86 nn.96-97 (addressing the fact that courts often seem to use either pretext-plus theory in one case, requiring the plaintiff to come forward with additional evidence, then in the next case follow a pretext-only theory). The First Circuit, for example, appears to have changed its mind from following a pretext-plus approach to one of pretext-only. In its decision in *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43 (1st Cir. 1990), the First Circuit held, "a plaintiff has the burden not only of proving that the articulated reasons of the employer were pretextual but also of adducing additional evidence that the articulated reasons were a pretext for age discrimination." *Id.* at 48. However, recently in *Cuello-Suarez v. Puerto Rico Elect. Power Auth.*, 988 F.2d 275 (1st Cir. 1993) the court expressly rejected its decision in *Olivera* as the law of the circuit and stated, "there is no absolute rule that a plaintiff must adduce additional evidence." *Id.* at 280, 280 n.6.

101. In addition to the Eighth and Third Circuits, other jurisdictions appear to apply the pretext-only standard. *See, e.g.,* *Lowe v. City of Monrovia*, 775 F.2d 998, 1008 (9th Cir. 1985) (holding that in order to prevail the plaintiff does not necessarily have to offer any evidence beyond that of a *prima facie* case, as this evidence alone may suffice to determine that the defendant's explanation is pretextual), *amended*, 784 F.2d 1407 (9th Cir. 1986); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 647 (5th Cir. 1985) (finding that the plaintiff need not prove the employer "was motivated by bad reasons; he need only to persuade the factfinder that the [employer's] purported good reasons were untrue."); *Lanphear v. Prokop*, 703 F.2d 1311, 1317 (D.C. Cir. 1983) (finding that an employer cannot prevail on a justification that is first articulated by the judiciary in the district court; the factual issues in question are relegated to determining if the employer's reasons are "specious"); *see also* *Lancot*, *supra* note 38, at 71-81 (discussing various pretext-only decisions).

102. 964 F.2d 723 (8th Cir.), *cert. denied*, 113 S. Ct. 635 (1992). For a further discussion of *Williams*, *see infra* notes 292-306 and accompanying text.

103. *Williams*, 964 F.2d at 728.

104. *Id.* at 725-26.

ployer asserted that the magistrate erred in failing to enter a judgment notwithstanding the verdict because there was no evidence of pretext or intentional age discrimination.¹⁰⁵ The court held that it was proper to apply the three stage order of proof outlined in *McDonnell Douglas* to an age discrimination case.¹⁰⁶ The employer argued, however, that the plaintiff's burden at the third stage goes beyond that of proving that the employer's reasons were pretextual.¹⁰⁷ The employer argued that the plaintiff must also prove that age was a determining factor in the employer's decision to fire him.¹⁰⁸ In rejecting the employer's contention, the court, quoting its decision in *MacDissi v. Valmont Industries, Inc.*,¹⁰⁹ stated that an "employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."¹¹⁰ The court recognized that this approach was inconsistent with the pretext-plus approach¹¹¹ and acknowledged that their

105. *Id.* at 726.

106. *Id.* The Age Discrimination in Employment Act, 29 USC § 621-34 (1990), "broadly prohibits discrimination in the workplace based on age," *Lorillard v. Pons*, 434 U.S. 575, 577 (1978), and is the exclusive federal remedy for age discrimination in the workplace. FRIEDMAN & STRICKLER, *supra* note 11, at 913. Section 623 (a)(1) of the Act provides: "It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623 (a)(1) (1990). The Act, however, is limited to discrimination against those 40 year and older. FRIEDMAN & STRICKLER, *supra* note 11, at 916.

Both the substantive text of the ADEA and its coverage are virtually identical to that of Title VII. FRIEDMAN & STRICKLER, *supra* note 11, at 914-15. In fact, the Supreme Court has noted that the "prohibitions of the ADEA were derived *in haec verba* from Title VII," *Lorillard*, 434 U.S. at 584, and has found it proper to apply Title VII jurisprudence where it is analogous to claims under the ADEA. FRIEDMAN & STRICKLER, *supra* note 11, at 926. Thus, courts have found that the *McDonnell Douglas* framework applies to age discrimination cases which rely on indirect evidence of discrimination. *See, e.g., Summers v. Communication Channels, Inc.*, 729 F. Supp. 1234 (N.D. Ill. 1990); *see also Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 121 (1985) (noting that the *McDonnell Douglas* test may not apply where there is direct evidence of discrimination and thus was not useful in the factual scenario presented in the case); *Lanctot*, *supra* note 39, at 62 n.14 (noting that the four elements of the *McDonnell Douglas* prima facie case have been applied to cases involving allegations of age discrimination). The *McDonnell Douglas* formulation, however, cannot always be strictly applied in an age discrimination case. *See* FRIEDMAN & STRICKLER, *supra* note 11, at 928-29 (citing examples of cases in which the court has had to modify the *McDonnell Douglas* test to allow an employee to establish a prima facie case).

107. *Williams*, 964 F.2d at 728.

108. *Id.* at 727.

109. 856 F.2d 1054 (8th Cir. 1988).

110. *Williams*, 964 F.2d at 728 (quoting *MacDissi*, 856 F.2d at 1059).

111. *Id.* The court cited *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir.

own decision in *Gray v. University of Arkansas*¹¹² had in fact hinted at the pretext-plus approach.¹¹³

In *Chipollini v. Spencer Gifts, Inc.*,¹¹⁴ the Third Circuit, in an en banc decision, reversed the lower court's grant of summary judgment for the defendant-employer.¹¹⁵ The plaintiff sought to prove that he was wrongfully terminated as a result of his age.¹¹⁶ In granting summary judgment, the lower court held that the plaintiff would be unable to prove pretext absent some direct evidence of discriminatory intent.¹¹⁷ It noted:

Nothing the plaintiff had proffered raises an issue of age as a factor that was considered along with the other intangibles. No statements made to plaintiff, no memos among defendant's decision-making employees have been submitted; no statistics have been compiled; no pattern or practice of discrimination has been suggested. To allow a jury to infer age discrimination would simply be to invite speculation.¹¹⁸

The appellate court reversed, finding that the district court erred in requiring the employee to show direct evidence that his age was a determinative factor in his termination.¹¹⁹ The court held that the proper standard allows the employee to "prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age."¹²⁰ Thus, in order for a court to grant summary judgment to an employer, the employer must demonstrate that the employee cannot present either direct evidence of a discriminatory intent, or indirect evidence of such intent by showing that the articulated reasons are subject to factual dispute.¹²¹ The court went on to state that an employer who "is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict."¹²²

In a more recent decision, the Third Circuit reiterated its *Chipol-*

1988), and *White v. Vathally*, 732 F.2d 1037, 1042-43 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984), as examples of advocating the pretext-plus approach.

112. 883 F.2d 1394 (8th Cir. 1989).

113. *Id.* at 1402.

114. 814 F.2d 893 (3d Cir. 1986), *cert. dismissed*, 108 S. Ct. 26 (1987).

115. *Id.* at 895.

116. *Id.* at 894.

117. *Id.* at 896.

118. *Id.* at 898 (quoting *Chipollini v. Spencer Gifts, Inc.*, 613 F. Supp. 1156 (D.N.J. 1985)).

119. *Id.* at 901-02.

120. *Id.*

121. *Id.* at 899.

122. *Id.*

lini holding in *Josey v. John R. Hollilngsworth Corp.*¹²³ In *Josey*, the plaintiff sought to prove that his former employer had discharged him because of his race.¹²⁴ The lower court granted summary judgment for the employer finding that the employee had failed to raise a genuine issue of fact as to pretext for his dismissal.¹²⁵ The appellate court reversed and noted that while the district court was entitled to accept the employer's reason of the necessity of a reduction in the work force as meeting his burden at the second stage, this reason could not be used as a veil to discriminate.¹²⁶ The Third Circuit found that there were inconsistencies in the employer's explanation which could lead a factfinder to find that the stated reasons were pretextual and render a verdict for the employee.¹²⁷

Where direct smoking gun evidence of discrimination is unavailable, this court has found that the proper inquiry is 'whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to the conclusion that the employer did act for discriminatory reasons.'¹²⁸

By strictly adhering to the language of the Supreme Court in decisions such as *Burdine* and *Aikens*, pretext-only circuits were able to justify a finding for the employee, even when the employee lacked direct evidence of an intent to discriminate.¹²⁹ Pretext-plus jurisdictions, however, rejected this notion.¹³⁰ These jurisdictions hold that proof that the employer's proffered reasons for their action were not credible is insufficient to prove intentional discrimination.¹³¹

123. 996 F.2d 632, 638 (3d Cir. 1993) (citing *Chippolini*, 814 F.2d at 900).

124. *Id.* at 635. The plaintiff, an African-American man, began working for his employer in 1976, moved to a supervisory position in 1978 and eventually became Assistant Manager of Quality Assurance in 1987. *Id.* The company had been sold to 13 white employees in 1982. *Id.* Neither the plaintiff nor the 13 other employees who had been employed longer than him were given the option to purchase shares. *Id.* Upon hearing that the current Manager of Quality Assurance planned to retire, the plaintiff became interested in the position and began training for it. *Id.* The current manager refused to train him and prior to the plaintiff's promotion remarked "that one's job could not be significant if it could be filled by a black person." *Id.* Other employees commented to plaintiff that they believed he was promoted on account of his race and the plaintiff found anonymous notes in his office containing various racial slurs. *Id.*

125. *Id.* at 636.

126. *Id.* at 639-40.

127. *Id.* at 640.

128. *Id.* at 638 (quoting *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 900 (3d Cir. 1986)).

129. See *supra* notes 95-96 and accompanying text (discussing the pretext-only rule).

130. See *supra* notes 97-99 and accompanying text (discussing the pretext-plus rule).

131. See *supra* note 98 and accompanying text (stating that pretext-plus courts require the

b. Pretext-plus decisions: examples from two circuits¹³²

In *Clark v. Huntsville City Board of Education*, the Eleventh Circuit appeared to apply the pretext-plus standard in denying the plaintiff recovery in a race discrimination case.¹³³ The plaintiff, an African-American principal working within the school system, was passed over for the job of director of vocational education.¹³⁴ The school filled the position with a white male who had not previously been employed by the school system.¹³⁵ The employer's articulated reason was that the man hired was better qualified.¹³⁶ Thus, according to the employer, the school board's policy of giving first consideration to qualified intra-system employees was not applicable as it only applied to employment decisions in which the candidates had tied.¹³⁷

The lower court found for the employee, stating that the school's refusal to adhere to the policy by considering the outside candidate's greater qualifications was a pretext for intentional discrimination.¹³⁸ The appellate court reversed, holding that while the court could consider the failure to adhere to the written policy as evidence of pretext, the court could not "leap directly from its interpretation of the policies to a conclusion of intentional discrimination."¹³⁹ The appellate court concluded:

[t]he [district] court thus may not circumvent the intent requirement of the

plaintiff to do more than simply show that the employer's reasons are untrue to prevail in a discrimination claim).

132. For a discussion of other pretext-plus decisions, see *Lancot*, *supra* note 38, at 81-91. While on the District Court for the District of Columbia, Justice Antonin Scalia, wrote a stern dissent in *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984), *later proceeding*, 35 Empl. Prac. Dec. (CCH) 34899 (D.D.C. 1984), which advocated the pretext-plus approach. *Id.* at 1239 (Scalia, J., dissenting). In *Carter*, the plaintiff, the only African-American in a small firm presented evidence that she was routinely treated differently from white employees, her pay had remained at the low end of the employer's pay scale and had presented evidence of a racist joke told by a supervisor. *Id.* at 1227-29. In his dissent, Justice Scalia stated, "[e]ven if a plausible showing of discriminatory treatment had been made, however, in order to get to the jury the plaintiff would still have to introduce some evidence that would enable a reasonable person to conclude that the *basis* for this discriminatory treatment was *race*." *Id.* at 1245 (Scalia, J., dissenting). For a further discussion of the *Carter* case, see *infra* notes 275-82 and accompanying text.

133. 717 F.2d 525 (11th Cir. 1983).

134. *Id.* at 526.

135. *Id.*

136. *Id.* at 527.

137. *Id.*

138. *Id.* at 528.

139. *Id.*

plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext; a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability.¹⁴⁰

Like the Eleventh Circuit, the Seventh Circuit has applied the pretext-plus approach in employment discrimination cases. In *La Montagne v. American Convenience Products, Inc.*,¹⁴¹ the Seventh Circuit held that the employee had failed to prove that age was a determining factor in the employer's decision to terminate his employment.¹⁴² The employer stated that the employee was fired because he had communication problems with his supervisor and had caused some divisiveness within his department.¹⁴³ The employee offered evidence showing that he had performed his job satisfactorily.¹⁴⁴ The court held that this evidence was not enough.¹⁴⁵ It stated that while the employee need not prove that age discrimination was the only factor motivating his discharge, he must prove that it was a determining factor among others:¹⁴⁶ "Thus we must also ask whether the evidence of age discrimination is sufficiently substantial to show that in addition to the [employer's] proffered reasons [the employee's] age was a factor, and indeed a determining factor, in his discharge."¹⁴⁷ Given that the federal circuits had two vastly different approaches in applying the same federal statute, it seemed only a matter of time before the Supreme Court would address the allocation of proof issue again.

III. SUBJECT OPINION: *St. Mary's Honor Center v. Hicks*.¹⁴⁸

A. Facts

The Supreme Court attempted to resolve the conflict surrounding the appropriate burden of proof in its decision in *St. Mary's*.¹⁴⁹ The plaintiff in the case was an African-American correctional officer employed by St. Mary's, a halfway house operated by the Missouri

140. *Id.* at 529.

141. 750 F.2d 1405 (7th Cir. 1984).

142. *Id.* at 1414.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. 113 S. Ct. 2742 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993).

149. *Id.*

Department of Corrections and Human Resources.¹⁵⁰ The plaintiff was hired in August, 1978 and was promoted to one of six supervisory positions in February, 1980.¹⁵¹ Prior to 1984, he had a satisfactory employment record.¹⁵² In 1984, following an investigation into the administration of the halfway house, John Powell became the new chief of custody and the plaintiff's immediate supervisor.¹⁵³ Subsequently, the plaintiff's job performance began to fail. He was suspended for five days as a result of institutional rules violations¹⁵⁴ and reprimanded for his alleged failure to investigate a fight which had occurred while he was supervising a shift.¹⁵⁵ When he failed to make sure that his subordinates properly logged their use of a St. Mary's vehicle in the record book, the plaintiff was demoted from his supervisory position to that of correctional officer.¹⁵⁶ He was eventually fired for threatening Powell during an argument.¹⁵⁷ He then filed suit against his employer claiming that the employer had violated Title VII by demoting and terminating him because of his race.¹⁵⁸

150. *Id.* at 2746.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* The alleged violation of institutional rules occurred when two transportation officers could not get into St. Mary's front door during the plaintiff's shift. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1246 (E.D. Mo. 1991), *rev'd & remanded*, 970 F.2d 487 (8th Cir. 1992), *cert. granted*, 113 S. Ct. 954 (1993), *rev'd & remanded*, 113 S. Ct. 2742 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993). The control center officer had to leave his post to let the officers in the front door. *Id.* Upon entering the building, the two found that the lights in the first floor were off and that another officer was not present at his post. *Id.* They filed a report with Powell. *Id.* A four person disciplinary board, composed of two whites and two African-Americans recommended that plaintiff be suspended for five days. *Id.* at 1246-47. The superintendent recommended the same to the director and the director suspended the plaintiff. *Id.* at 1247.

155. *St. Mary's*, 113 S. Ct. at 2746. The plaintiff drafted a memo to John Powell informing him of the fight between the two inmates and ordered another guard to submit a report. *Hicks*, 756 F. Supp. at 1247. John Powell submitted a report to Steve Long because the plaintiff failed to investigate "the seriousness of the assault or the after effects on the residents involved." *Id.*

156. *Hicks*, 756 F. Supp. at 1247. The institution's rules required that each use of the vehicles be recorded in the log. *Id.* As a result of this, a four person disciplinary board of two whites and two African-Americans voted to demote the plaintiff. *Id.* The board's recommendation was implemented. *Id.*

157. *St. Mary's*, 113 S. Ct. at 2746. The argument occurred following a meeting the plaintiff had with Powell, Long, and another supervisor in which they told him that he was being demoted. *Hicks*, 756 F. Supp. at 1247. Powell followed the plaintiff out of the meeting and asked him to go to his locker so that Powell could get the plaintiff's supervisory manual. *Id.* A four-member disciplinary panel voted to suspend plaintiff for three days, but Long recommended termination. *Id.* at 1247-48. The director terminated the plaintiff. *Id.* at 1248.

158. *St. Mary's*, 113 S. Ct. at 2746.

B. Procedural History

The district court held that the employee had established a *prima facie* case and that his employer had proffered two legitimate, non-discriminatory reasons for its actions: the severity of the plaintiff's violations and the number of violations.¹⁵⁹ The court further found that the plaintiff had proved pretext by showing that he and not any of the subordinates had been disciplined for incidents which gave rise to institutional violations and that a shift supervisor had not been disciplined in similar circumstances.¹⁶⁰ The plaintiff also submitted evidence showing that a supervisor had not been disciplined for violations of a more serious nature.¹⁶¹ The court found that while the plaintiff proved pretext, his burden of proving intentional discrimination had not been met because he had "not proven that the crusade [against him] was racially rather than personally motivated."¹⁶² Because the court found that the plaintiff had failed to prove that his unfair treatment was motivated by his race, it granted judgment in favor of the employer.¹⁶³

On appeal, the Eighth Circuit reversed the lower court's decision.¹⁶⁴ The appellate court found that the lower court erred in assuming that the employer's actions were motivated by personal rea-

159. *Id.* at 2747.

160. *Id.* at 2748. The plaintiff established, for example, that on two separate occasions during a supervisor's shift the front door officer was not present and that the control center officer had to leave his post to open the door. *Hicks*, 756 F. Supp. at 1250-51. During another shift under the same supervisor, the doors to the main power room were left open and "[a]n inmate who had access to [this room] could [have] turn[ed] off the electricity and disable[d] the security system." *Id.* at 1251. At no time was the shift supervisor disciplined for these incidents. *Id.*

161. *Hicks*, 756 F. Supp. at 1251. An inmate escaped during one supervisor's shift. *Id.* Although the supervisor admitted the escape occurred as a result of his negligent failure to carry out an order, he was not disciplined. *Id.*

162. *Id.* at 1252. The plaintiff attempted to show that St. Mary's had disproportionately fired African-Americans in 1984. The court dismissed this as direct evidence finding that the number of African-Americans had remained consistent throughout 1984. *Id.* Furthermore, the court held that it was "not unusual" that as a result of the personnel changes in 1984, several African-Americans were replaced by whites as almost all of the supervisory positions prior to 1984 were held by blacks. *Id.* As a factor in weighing the employer's intent, the court also considered that there were at least two blacks on each of the disciplinary review boards. *Id.* The plaintiff also introduced a study conducted before his termination which claimed that blacks had too much power at St. Mary's. *Id.* The court discredited this evidence as both Long and Powell claimed that they were not aware of the study until after they had already made the decision to terminate the plaintiff. *Id.*

163. *Id.*

164. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 488 (8th Cir. 1992), *cert. granted*, 113 S. Ct. 954 (1993), *rev'd & remanded*, 113 S. Ct. 2742 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993).

sons because this was not a reason articulated by the employer.¹⁶⁵ The appellate court reasoned that once the employer articulated the two legitimate, nondiscriminatory reasons for his actions and both were discredited as pretexts by a preponderance of the evidence, the employee had met the ultimate burden of persuasion and was entitled to judgment as a matter of law.¹⁶⁶

C. *The Supreme Court's Opinion*

1. *The Majority Opinion*

In a 5-4 opinion written by Justice Scalia, the Supreme Court reversed the Eighth Circuit's decision.¹⁶⁷ The Court first focused upon the presumption of discrimination created by the *prima facie* case. It stated that the establishment of the presumption by the *prima facie* case "produces a required conclusion in the absence of explanation" that the employer had discriminated.¹⁶⁸ This presumption then places the burden upon the employer to produce an explanation rebutting the *prima facie* case.¹⁶⁹ The Court noted, however, that once the employer has produced evidence of nondiscriminatory reasons, regardless of whether they are ultimately persuasive or not, he has sustained his burden. This places the employer in a better position than if he were to remain silent at the second stage.¹⁷⁰ The Court stated that the trial court is then in the position to decide the ultimate question of fact — whether the employer intentionally discriminated against his employee.¹⁷¹ The Court noted that disbelief of the employer's proffered reasons especially when accompanied by a suspicion of mendacity, along with the proof of the *prima facie* case could be enough to prove discrimination.¹⁷² The Court found

165. *Id.* at 492. The court had reservations about whether personal motivations could actually ever be considered a legitimate, nondiscriminatory reason. *Id.* Accordingly, the court chose not to address personal motivations as the defendant had not presented it as a reason. *Id.*

166. *Id.* at 492-93.

167. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993).

168. *Id.* (citing 1 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 67, 536 (1977)).

169. *Id.*

170. *Id.* at 2748. As the establishment of the *prima facie* case creates a presumption that the employer discriminated, then remaining silent would result in judgment for the plaintiff. *Id.* at 2747 (citing LOISELL & MUELLER, *supra* note 168, at §§ 67, 536).

171. *Id.* at 2749.

172. *Id.* Justice Scalia stated that, "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* (emphasis in original).

however, that the appellate court's holding that the rejection of the defendant's proffered reasons compels judgment for the plaintiff.¹⁷³ The holding "disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion."¹⁷⁴

Justice Scalia presented a hypothetical case in support of his argument.¹⁷⁵ In the hypothetical, the employer has a forty percent minority work force with minorities consisting of only ten percent of the relevant labor market.¹⁷⁶ A minimally qualified minority applicant is rejected.¹⁷⁷ The company's hiring officer who made the decision is also a member of the applicant's minority group.¹⁷⁸ Subsequently, the applicant files suit, but before trial, the hiring officer is fired.¹⁷⁹ Justice Scalia proposed that under the dissent's interpretation of the law which allows the plaintiff to prove his case indirectly, the statistical evidence of a disproportionate minority makeup would be irrelevant as would the fact that the hiring officer was a member of the same minority group.¹⁸⁰ Justice Scalia stated that under the dissent's approach the employer would be forced to articulate some rational explanation for its refusal to hire, relying on the "now antagonistic former employee" to lend credibility to its reason.¹⁸¹ And further, that the jury would have to be instructed that if they found the explanation to be incredible, they must find against the employer, regardless of whether or not they believe the employer had actually discriminated.¹⁸²

Justice Scalia then turned his attention to the dissenting opinion's

173. *Id.*

174. *Id.* Rule 301 of the Federal Rules of Evidence reads:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301. For a discussion of Rule 301, see *infra* notes 241-52 and accompanying text.

175. *St. Mary's* 113 S. Ct. at 2750-51. For a critique of Justice Scalia's hypothetical, see *infra* notes 263-65 and accompanying text.

176. *St. Mary's*, 113 S. Ct. at 2750.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 2751.

181. *Id.*

182. *Id.*

use of the language in the Court's decision in *Burdine*.¹⁸³ Justice Scalia noted that all of the language that the dissent quoted from *Burdine*, with one exception, could be read consistent with his opinion.¹⁸⁴ First, according to Justice Scalia, the dissent misconstrued the language in *Burdine* stating "the plaintiff must . . . have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."¹⁸⁵ Justice Scalia contended that this statement does not mean as the dissent would have it, that once the employee proves the reasons are false he wins. Rather, the employee must show both that the reasons were false and that discrimination was the real reason.¹⁸⁶

Second, Justice Scalia concentrated on the language in *Burdine*¹⁸⁷ which stated that once the employer has met its burden of production, "the factual inquiry proceeds to a new level of specificity."¹⁸⁸ He argued that this does not mean that the inquiry is reduced to whether the employer's asserted reasons are true or false.¹⁸⁹ Instead, it "refer[s] to the fact that the inquiry now turns from the few generalized factors that establish a *prima facie* case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced."¹⁹⁰

Third, Justice Scalia asserted that the sentence which states, "[p]lacing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext,"¹⁹¹ does not mean that the only issue is whether the employer's reasons are false.¹⁹² The word "pretext" is properly characterized as "pretext for discrimination," and refers to the "form rather than the substance of the defendant's burden: The requirement that the employer 'clearly set forth' its reasons [to give] the plaintiff a 'full and fair' rebuttal opportunity."¹⁹³

183. *Id.* (discussing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

184. *Id.* at 2753.

185. *Id.* at 2751-52 (quoting *Burdine*, 450 U.S. at 253).

186. *Id.*

187. 450 U.S. 248 (1980).

188. *St. Mary's*, 113 S. Ct. at 2752 (quoting *Burdine*, 450 U.S. at 255).

189. *Id.*

190. *Id.*

191. *Id.* (quoting *Burdine*, 450 U.S. at 255-56).

192. *Id.*

193. *Id.* (citations omitted).

Next, Justice Scalia addressed the language in *Burdine*¹⁹⁴ which states, "[the employee] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."¹⁹⁵ The Justice held that the proper reading of the word "merges" was not that the employee prove that the reasons were false, but that the proof that the employer's reasons are untrue "becomes part of (and often considerably assists) the greater enterprise of proving that the employer's real reason was intentional discrimination."¹⁹⁶

Finally, Justice Scalia quoted the statement, "[the employee] may succeed in this [*i.e.*, in persuading the court that she has been the victim of intentional discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."¹⁹⁷ While Justice Scalia admitted that the statement's only logical explanation is that the employee's proof that the employer's reasons are false is enough to compel judgment for the employee,¹⁹⁸ he stated "that [the statement] contradicts or renders inexplicable numerous other statements, both in *Burdine* itself and in our later case-law."¹⁹⁹

In its opinion, the majority attacked the dissent's proposition that the majority's approach would favor employers who lied about the reasons for their actions:²⁰⁰ "To say that the company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd."²⁰¹ The majority pointed out that while the employer who offers a phony reason at the second stage may be in a better position than the one who remains silent, other procedural rules operate to uncover the truth.²⁰² The majority

194. 450 U.S. 248 (1980).

195. *St. Mary's*, 113 S. Ct. at 2752 (quoting *Burdine*, 450 U.S. at 256).

196. *Id.*

197. *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973)).

198. *Id.*

199. *Id.* at 2752-53.

200. *Id.* at 2754.

201. *Id.*

202. *Id.* at 2755. The Court points to a complaint's response as one example. If the defendant fails to respond, this results in a judgment for the plaintiff, while the defendant's deceitful response will not. *Id.*

called the dissent's approach to "judgment-for-lying" unfair and "strangely selective."²⁰³ According to Justice Scalia, this is especially true since the employer can lie about every other aspect of the case such as whether the plaintiff actually applied for the job, his length of employment, or his salary without suffering the adverse consequence of a judgment against him.²⁰⁴ The majority emphasized that the employee can lie "about absolutely *everything* without losing a verdict he otherwise deserves."²⁰⁵ Similarly, the majority dispelled the dissent's fear that the employee will have to peruse the record to find and disprove the reasons that have not been articulated by the employer. The majority noted that the employer's reasons do not exist apart from the record but are set forth "through the introduction of admissible evidence."²⁰⁶ Finally the majority stated:

Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer²⁰⁷

The majority found that this view was in accord with the Court's decision in *Aikens*²⁰⁸ and remanded the case to the lower court to determine if enough evidence existed to find that the employer's decision had been motivated by race.

In sum, the majority held that for an employee to prevail on a claim of employment discrimination, the employee must first establish a *prima facie* case of discrimination.²⁰⁹ Once the *prima facie*

203. *Id.* at 2754.

204. *Id.* at 2754-55.

205. *Id.* at 2755 (emphasis in original).

206. *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)).

207. *Id.* at 2756.

208. 460 U.S. 711 (1983). The Court recited the following passage from *Aikens*,

[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof" in deciding this ultimate question.

St. Mary's, 113 S. Ct. at 2756 (citations omitted).

209. *Id.* at 2746-47.

case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for his behavior.²¹⁰ Once the employer has articulated some nondiscriminatory reason for his action, the presumption of discrimination drops from the case and the burden shifts back to the employee.²¹¹ At this stage, however, the majority found that the employee could not prevail as a matter of law on indirect proof that the employer's proffered reasons for the negative employment action were not credible.²¹² Instead, the Court held that the employee must also introduce evidence that discrimination was, in fact, the true reason for the decision.²¹³

2. *The Dissent*

The dissent, written by Justice Souter, attacked the majority's approach as contrary to stable and existing law by allowing the factfinder (after the employee has proven that the employer's reasons are pretextual) "to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove."²¹⁴ In making this argument, the dissent noted that establishing a *prima facie* case in the context of a Title VII suit means that the employee has actually established the elements by a preponderance of the evidence.²¹⁵ By doing so, he "has eliminat[ed] the most common nondiscriminatory reasons" for the employment decision.²¹⁶ The dissent reasoned that while it would be unfair to prohibit the employer from articulating a nondiscriminatory explanation for its decision, "it would be equally unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."²¹⁷

Justice Souter argued that its opinion was also consistent with Rule 301 and agreed with the majority that once the employer met his burden, the presumption entitling the employee to judgment

210. *Id.* at 2747 (citing 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 67, at 536 (1977)).

211. *Id.*

212. *Id.* at 2752.

213. *Id.*

214. *Id.* at 2757 (Souter, J., dissenting).

215. *Id.* (citing *Texas Dep't of Community Affairs v. Burdine* 450 U.S. 248, 252-53 (1981)).

216. *Id.* at 2758 (citing *Burdine*, 450 U.S. at 254) (alteration in original).

217. *Id.*

dropped from the case.²¹⁸ However, the dissent accused the majority of neglecting the burden's other important function — to “frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”²¹⁹ Justice Souter suggested that the employer is obligated “to choose the scope of the factual issues to be resolved by the factfinder,” and should be bound by the issues it chose.²²⁰ To hold otherwise would be contrary to the Court’s policy requiring that the employer’s reasons be “clear and reasonably specific.”²²¹ The dissent insisted that the reasons the employer articulates are the issues which frame the factual inquiry; an inquiry which then “proceeds to a new level of specificity.”²²² Justice Souter asserted that during this more specific inquiry, the employer does not have to prove that its proffered reasons are true, “rather the [employee] must prove by a preponderance of the evidence that [these] reasons are pretextual.”²²³ Moreover, the dissent insisted that this interpretation of the new level of specificity requirement is further supported by the passage in *Burdine*²²⁴ which enables the employee to prove intentional discrimination via direct evidence or indirect evidence “by showing that the employer’s proffered explanation is unworthy of credence.”²²⁵ The dissent stated that since the court found that the employee had carried his burden by showing that his employer’s reasons were pretextual, he was entitled to judgment as a matter of law.²²⁶

The dissent argued that the majority’s approach:

fails to explain how the plaintiff . . . will ever have a ‘fair and full opportunity’ to demonstrate that reasons not articulated by the employer, but discerned in the record by the factfinder are also unworthy of credence [and thereby] transforms the employer’s burden of production from a device used to provide notice and promote fairness into a misleading and potentially useless ritual.²²⁷

Justice Souter also raised the concern that the majority has sent conflicting signals regarding the scope of its decision; finding on the

218. *Id.* at 2759 & 2759 n.2.

219. *Id.* (quoting *Burdine*, 450 U.S. at 255-56).

220. *Id.*

221. *Id.* (quoting *Burdine*, 450 U.S. at 258).

222. *Id.* (quoting *Burdine*, 450 U.S. at 255).

223. *Id.* (citing *Burdine*, 450 U.S. at 255, 256).

224. 450 U.S. 248 (1980).

225. *St. Mary's*, 113 S. Ct. at 2760 (Souter, J., dissenting) (citing *Burdine*, 450 U.S. at 256).

226. *Id.* at 2760-61.

227. *Id.*

one hand that the Court supported the notion that the discrediting of the employer's articulated reasons would not be sufficient to sustain judgment for the employee, yet stating in another passage that such discrediting would "permit the trier of fact to infer the ultimate fact of discrimination."²²⁸ In addition, the dissent referred to the Court's decision to remand the case as "keeping Hicks's chance of winning a judgment alive although he has done no more (in addition to proving his *prima facie* case) than show that the reasons proffered by St. Mary's are unworthy of credence."²²⁹

Justice Souter then focused on the inequity of allowing an employer to escape liability by lying:

There is simply no justification for favoring these employers by exempting them from responsibility for lies. It may indeed be true that such employers have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them. One can understand human frailty and the natural desire to conceal it, however, without finding in it a justification to dispense with an orderly procedure for getting at "the elusive factual question of intentional discrimination."²³⁰

The dissent noted that to find otherwise would defeat the purpose of Title VII as employees would decide not to sue as a result of the uncertainties of the scheme.²³¹ The dissent reasoned that "the majority assumes that some employers will be unable to discover the reasons for their own personnel actions."²³² By requiring the employee to refute "any conceivable explanation for the employer's action that might be suggested by the evidence,"²³³ this "will promote longer trials and more pre-trial discovery, threatening increased expense and delay in Title VII litigation for both plaintiffs and defendants, and increased burdens on the judiciary."²³⁴

Finally, the dissent surmised that the majority's reliance on *Aikens* was unfounded, finding instead that "*Aikens* flatly bars the Court's conclusion here that the factfinder can choose a third explanation, never offered by the employer, in ruling against the plaintiff."²³⁵ Justice Souter stated, "[w]hether Melvin Hicks wins or loses

228. *Id.* at 2762 (quoting the majority opinion at 2756).

229. *Id.*

230. *Id.* (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)).

231. *Id.*

232. *Id.* at 2764.

233. *Id.* at 2763.

234. *Id.*

235. *Id.* at 2765. The dissent noted that *Aikens* repeated the standard articulated in *Burdine* that the plaintiff may prove pretext either with direct evidence of discrimination or via indirect

on remand, many plaintiffs in a like position will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ."²³⁶

In sum, the dissent agrees with the majority that once the defendant articulates a nondiscriminatory reason for its action, the presumption of discrimination established by the *prima facie* "drops from the case."²³⁷ However, the dissent disagrees with the majority about the proper disposition of the case when the employee then offers proof that the employer's proffered reasons are without credence.²³⁸ The dissent believes that when the employee has shown that the employer's reasons at the second stage are fallible, the employee should not be required to produce either direct evidence of discriminatory intent or eliminate all possible nondiscriminatory reasons for an employment decision.²³⁹ Instead, the dissent believes that once the employer's proffered reasons are discredited, the employee is entitled to judgment as a matter of law.²⁴⁰

IIV. ANALYSIS

A. Rule 301

In his majority opinion, Justice Scalia relies on Federal Rule of Evidence 301²⁴¹ to justify allocating the burden of proof in the manner used in the *McDonnell Douglas* case. Justice Scalia supports the view that once the employer-defendant has proffered legitimate, nondiscriminatory reasons for the employment decision at issue — thereby meeting his burden of production — the presumption of discrimination "drops from the case."²⁴² Justice Scalia considers this view consistent with the way other presumptions operate in the law.²⁴³

evidence making the employer's reasons unbelievable. *Id.* The dissent also noted in *Aikens* that the statement which directs the court to "decide *which party's* explanation . . . it believes" upon which the majority relied, supports its holding as well, "[b]y requiring the factfinder to choose between the employer's explanation and the plaintiff's claim of discrimination (shown either directly or indirectly)." *Id.* (emphasis in original) (citations omitted).

236. *Id.* at 2766.

237. *Id.* at 2759 (citations omitted).

238. *Id.*

239. *Id.* at 2758.

240. *Id.* at 2760-61.

241. For the text of Rule 301 of the Federal Rules of Evidence, see *supra* note 174.

242. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1980).

243. *St. Mary's*, 113 S. Ct. at 2755.

Although Title VII litigation is subject to the same procedural rules as other civil litigation,²⁴⁴ as well as Rule 301, the precise application of Rule 301 has long been debated, even at the time Congress adopted the Rule.²⁴⁵ There are two views through which the presumption of discrimination may be viewed — the Thayer-Wigmore rule and the Morgan-McCormick rule.²⁴⁶ Under the Thayer-Wigmore rule, the presumption is used as a matter of procedural convenience and “operates only in the absence of evidence offered to rebut the presumed fact.”²⁴⁷ Once the presumption is rebutted, however, it vanishes — hence, it is characterized as the “bursting bubble” theory.²⁴⁸ The Morgan-McCormick rule, on the other hand, asserts that presumptions were created for reasons of policy and should permanently alter the burden of persuasion.²⁴⁹ Under the Morgan-McCormick rule, the ultimate burden of persuasion never shifts. Instead, the intermediate burden (the one at the second stage) shifts, and “each party’s satisfaction of these intermediate burdens determines who prevails.”²⁵⁰ While Rule 301 has generally been interpreted to follow the bursting-bubble theory articulated by Thayer-Wigmore,²⁵¹ at least one commentator has suggested that it operates as more of a hybrid of the two rules.²⁵²

Although it appears that Justice Scalia’s approach to burden allocation in discrimination cases is technically correct, it may not be morally sound. It is questionable whether the operation of this presumption would further the purpose of the Civil Rights Act. Under Justice Scalia’s approach, the “shifting” ceases after the employer has articulated some reason for his actions and the plaintiff must then prove the employer’s actions were a pretext for intentional dis-

244. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (describing the burden as one that follows the usual method of federal courts).

245. See, e.g., Steven D. Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1110-13 (1984) (describing the various views about the application of Rule 301 presumption).

246. *Id.* at 1107 (citing 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5122 (1977)).

247. *Id.* at 1108.

248. *Id.*

249. *Id.* at 1109.

250. Raymond Nardo, *St. Mary’s Honor Center v. Hicks Burst Bubble in Employment Discrimination*, N.Y. L.J., Aug. 9, 1993, at 1, 4 (citation omitted).

251. Smith, *supra* 245, at 1110.

252. *Id.* (describing Rule 301 as a hybrid rule that “probably has more in common with the Thayer-Wigmore rule than the Morgan-McCormick rule”).

crimination.²⁵³ Given that discrediting the employer's proffered reasons are not enough, the plaintiff is stuck in the position in which he had begun the case.²⁵⁴

While the employer's burden of production rebuts the mandatory presumption, it does not mean that the evidence of the *prima facie* case is without probative value.²⁵⁵ At least one commentator has suggested that even after the defendant has articulated some legitimate, nondiscriminatory reason, "[i]t would be more consistent with Title VII to give the presumption some weight in helping the plaintiff to meet her burden of persuasion."²⁵⁶ Justice Scalia points out that the factfinder is free to infer from that evidence that the employer did discriminate, but the plaintiff is not entitled to judgment as a matter of law.²⁵⁷ His interpretation, however, undermines his unwillingness to allow proof of discrimination by "indirect evidence" to be a sufficient basis upon which a defendant can prevail and contradicts the Court's own recognition that there will seldom be direct evidence of intentional discrimination.²⁵⁸

B. Rewarding Employers' Lies

Adoption of this type of rule arguably gives the employer a strong incentive to lie.²⁵⁹ In fact, as the dissent points out, this allocation of burdens actually rewards the employer for lying and places the plaintiff in a significantly weaker position than when he started.²⁶⁰ As one commentator noted, "[i]t need not matter whether these reasons actually motivated the employer, or whether they are accurate;

253. See *supra* notes 168-74 and accompanying text (describing the approach Justice Scalia advocates).

254. See *supra* notes 173-74 and accompanying text (discussing Justice Scalia's view that Rule 301 mandates that the plaintiff do more than show the defendant's reasons are untrue to prevail in a discrimination claim).

255. See, e.g., *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 254 (1st Cir. 1986) (explaining the probative value of the evidence used to create a presumption).

256. Smalls, *supra* note 22, at 266.

257. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993); see also Brief of Washington Legal Foundation and the Equal Opportunity Foundation as Amici Curiae in Support of Petitioners, *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (No. 92-602), available in Lexis, Genfed Library, Briefs File (stating that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation").

258. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

259. See *Lancot*, *supra* note 38, at 105 ("[T]he truth of defendant's evidence is irrelevant to whether defendant has met its burden of rebutting a presumption.").

260. *St. Mary's*, 113 S. Ct. at 2764.

simply by offering them, the defendant-employer avoids a compelled judgment against him."²⁶¹

Although Justice Scalia is offended by the dissent's reference to employers whose proffered reasons are disbelieved as "liars,"²⁶² the hypothetical that he proposes to defend his position is equally reprehensible.²⁶³ Justice Scalia is willing to forego granting judgment to a plaintiff who has proven that the defendant's articulated reasons are not credible, for the chance that the only person who knows anything about the employment decision which is the subject of the litigation has since been fired from his position.²⁶⁴ He fears that the former employee, who is now openly hostile toward his employer, would lie about the reasons for the decision thereby forcing the employer to articulate some other legitimate, non-discriminatory reason for its action which may not be based in fact.²⁶⁵

First, no evidence is presented to show the likelihood of the occurrence of the situation described in the hypothetical and it is unlikely that it is not very high. Second, Justice Scalia appears to operate under the assumption that the employer is somehow barred from presenting evidence that it is relying on a disgruntled former employee for help in sustaining its burden at the second stage, and that a judge is somehow incapable of taking this evidence into consideration when making his judgment. The small number of cases represented by Justice Scalia's hypothetical should not be used to create a blanket rule eliminating the plaintiff's chance to win a grant of summary judgment and forcing him to incur the costs of further litigation.

Further, Justice Scalia posits that the employer would be barred from presenting statistics showing that the employer's minority work force far exceeds the percent of minorities in the relevant labor market or that the hiring officer making the decision was a member of the same minority group.²⁶⁶ Justice Scalia offers no explanation in support of this conclusion. If the employer denies having discriminated against the employee (an option which is always available to

261. Nardo, *supra* note 250, at 4.

262. *St. Mary's*, 113 S. Ct. at 2754 (stating "there is no justification for assuming (as the dissent repeatedly does) that those employers whose evidence is disbelieved are perjurers and liars").

263. See *supra* notes 175-82 and accompanying text (describing the hypothetical).

264. See *supra* note 180-82 and accompanying text (stating Justice Scalia's view).

265. *St. Mary's*, 113 S. Ct. at 2751.

266. *Id.*

the employer as a defense), this evidence would be relevant and could be entered into the record by the employer.²⁶⁷ Interestingly, Justice Scalia seems willing to allow the employer to present statistics to prove that it did not intentionally discriminate, while he is seemingly unwilling to allow the employee to prevail on such "indirect evidence" were it to favor a finding of discrimination.²⁶⁸

As the dissent properly notes, Justice Scalia assumes that employers do not keep employment records and will not know how it arrived at the decision it made.²⁶⁹ Good business practice would dictate that an employer keep a record on each employee and document the reasons for any adverse employment decisions, such as firings, in order to insulate itself from liability. Justice Scalia's rationale serves as a disincentive to keep accurate records and encourages compartmentalizing of information regarding employment decisions as the employee is forced to prove not only that the employer was not motivated by the reasons he proffered, but also that he was not motivated by some other reason "in the record." Even in the hiring context, the employer, while it may not keep a list of those applying for the job, must have some basic qualifications it looks for in an applicant and some idea as to why the person who was passed over was not hired (*i.e.*, the other person was better qualified, has more experience, or has better interpersonal skills). Justice Scalia refuses to place the burden on the employer to even articulate all the possible reasons for its decision. Nevertheless, he is comfortable with placing the onerous burden on the plaintiff to ascertain from the record what reasons the employer had for making the decision, to prove both that the reasons proffered by the employer and those obtained from the record were not the factors used in the employment context, and further to prove that discrimination was the employer's underlying motive.²⁷⁰

C. Failure to Allow Proof of Discrimination by Indirect Evidence

If the majority's opinion is wholeheartedly adopted, the allocation

267. Lamber, et al. *supra* note 20.

268. See *supra* notes 173-74, 266 and accompanying text (describing Justice Scalia's opinion that rejection of the employer's reasons does not compel judgment for the employee, and his concern that under the dissent's view, the employer would be barred from preventing favorable statistics).

269. *St. Mary's*, 113 S. Ct. at 2764.

270. *Id.* at 2747-50.

of the burdens does not operate logically. The employee relies on the *prima facie* case to create a presumption of discrimination for the very reason that he does not have direct evidence of discrimination.²⁷¹ If, in fact, the employee has direct evidence, the three stage evidentiary triumvirate of *McDonnell Douglas* is not needed.²⁷² The employee who presents direct evidence of discrimination in the first instance shifts the burden to the defendant to prove that he did not discriminate.²⁷³ Thus, the plaintiff's two different allocations, one creating a presumption and the second submitting direct evidence of discrimination, collapse. Regardless of which path the employee chooses, absent direct evidence of discriminatory motive, not only is summary judgment unobtainable, but the employee's case will ultimately fail. Accordingly, it becomes important to determine what is considered "plus" or "direct" evidence of discriminatory motive.

D. What is "Plus" Evidence?

In considering what would be enough evidence for the finding of discrimination, it is important to note that the Supreme Court is well aware that there is rarely eyewitness evidence of discrimination.²⁷⁴ Undoubtedly that is the precise reason why the Supreme Court created the triumvirate evidentiary stages in its opinions in *McDonnell Douglas* and *Burdine*. The necessity of relying on circumstantial or indirect evidence is due to the employee's inability to get inside the decision-maker's mind to determine what his intent is in making employment decisions. It is no surprise to find Justice Scalia authoring the majority's opinion in light of his dissent in *Carter v. Duncan-Huggins, Ltd.*²⁷⁵ when he was a circuit judge. In *Carter*, an African-American employee in a small company brought

271. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (stating that the purposes of the *McDonnell Douglas prima facie* case requirement is to compensate for the "fact that direct evidence of intentional discrimination is hard to come by").

272. See *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (stating that when the plaintiff uses direct evidence of discrimination, he need not rely on the *McDonnell Douglas* allocation of proof).

273. See Robert S. Whitman, Note, *Clearing the Mixed Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 883 n. 110 (1989) ("The plaintiff's proof by means of direct evidence does not merely fulfill his burden of showing a *prima facie* case; it suffices to make his entire case and throws the burden on the defendant of proving, at least by a preponderance of the evidence, that it would have rejected the plaintiff even in the absence of discrimination.") (citation omitted).

274. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

275. 727 F.2d 1225 (D.C. Cir. 1984); see *supra* note 132 (discussing Justice Scalia's dissent in the *Carter* case).

an action against her employer alleging that she was discriminated against on the basis of her race.²⁷⁶ At trial, the employee presented evidence that she had been repeatedly treated differently than the white employees.²⁷⁷ The court of appeals affirmed the lower court's decision for the plaintiff employee finding that she "introduced sufficient evidence from which the jury could have deduced discrimination."²⁷⁸ In his dissent, Justice Scalia argued that the majority's reliance on evidence of differential treatment to prove racial motivation was unwarranted.²⁷⁹ He stated, "[d]efendant's work force is too small to make any statistical analysis of the treatment of black and white employees useful in deciding whether it purposefully discriminated against plaintiff because she was black."²⁸⁰ Justice Scalia went on to add that without this evidence there "was no evidence of racial motivation . . . except for the plainly inadequate instance of the racial slur."²⁸¹ The Justice believed that the employer should have been granted a directed verdict in the case stating, "it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury."²⁸²

Based on Justice Scalia's dissent in *Carter*, the employee in a small business firm who is repeatedly treated differently would not be able to make out a case of intentional discrimination simply because he cannot provide the court with statistical evidence to support his case.²⁸³ Absent direct evidence of discrimination, the small business owner appears to have immunity from Title VII simply due to its size and despite the fact that Title VII applies to all employers with fifteen employees or more.²⁸⁴ A question remains as to whether

276. *Carter*, 727 F.2d at 1228.

277. The plaintiff was the only African-American employee in the firm. *Id.* The evidence of differential treatment included the seclusion of the plaintiff to one end of the company's showroom, her supervisor's instructions that she should not answer the phone, her salary was the lowest and her bonuses were the fewest of the employees, and a supervisor made a racially derogatory remark in her presence. *Id.* at 1228-30. There was also testimony that the plaintiff was treated unequally in access to staff meetings, to a parking space, and to the actual facility. *Id.* at 1230.

278. *Id.* at 1235.

279. *Id.* at 1245-47 (Scalia, J., dissenting). For a discussion of the evidence of differential treatment the plaintiff had presented, see *supra* note 277.

280. *Carter*, 727 F.2d at 1246.

281. *Id.* (emphasis in original).

282. *Id.* at 1247.

283. *Id.* at 1246.

284. Section 701(b) of the Civil Rights Act provides in the relevant part: "For the purposes of

or not, in Justice Scalia's opinion, any statistical evidence would have been enough given that the other "indirect" evidence of racial bias (the racially derogatory remark) was "plainly inadequate."²⁸⁵

The use of statistics as evidence of discriminatory motive in disparate treatment cases has been a serious topic of debate.²⁸⁶ In *McDonnell Douglas*, the Supreme Court hinted that the use of statistics would significantly help the plaintiff in establishing pretext.²⁸⁷ Statistics are relevant in the context of disparate treatment in that they may show a pattern of differential treatment of minority group members to support the inference that the employer discriminated against the individual on the basis of his group membership.²⁸⁸ However, commentators have suggested that the courts should be leery of statistical showings and be "more demanding in the sophistication required of plaintiffs' statistical showings."²⁸⁹ For example, one commentator noted that "[t]he plaintiff seeking to employ statistical analysis must demonstrate that all or substantially all of the factors that contribute to [the employer's decision] are taken into account in the statistical model."²⁹⁰

Because statistical evidence may be unobtainable, the employee may turn to other information to infer discriminatory motive.²⁹¹ In

this subchapter —

(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" 42 U.S.C. § 2000e(b) (1991).

285. *Carter*, 727 F.2d at 1246 (Scalia, J., dissenting).

286. For a discussion of the various views regarding the use of statistics in both disparate impact and disparate treatment cases, see *supra* note 20.

287. For a discussion of the Court's holding in *McDonnell Douglas*, see *supra* notes 37-45 and accompanying text.

288. *Lamber*, et al. *supra* note 20, at 570.

Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the . . . population in the community from which employees are hired. Evidence of longstanding and gross disparity between the composition of the work force and that of the general population thus may be significant

International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977), cited in, *Sullivan*, *supra* note 21, at 1113.

289. *Browne*, *supra* note 38, at 541.

290. *Id.* at 555.

291. The unavailability of statistical evidence may be due to the small minority representation within a company, or to the necessity that the employee take into account all of the factors in the employer's decision. See, e.g., *Sullivan*, *supra* note 21, at 1114 ("Small employers with little employee turnover, for example, may not exhibit a 'statistically significant' proportion of white em-

Williams v. Valentec Kisco,²⁹² for example, the employee sought to prove that he had been discriminated against on the basis of his age in the employer's decision to terminate him.²⁹³ The jury found for the employee and the employer asked the lower court to enter a judgment notwithstanding the verdict.²⁹⁴ The lower court refused and the employer appealed.²⁹⁵ In that case, the employee had recently returned from a medical leave of absence because of work-related injuries and prostate surgery.²⁹⁶ He requested a transfer to the second shift so that he could perform his regular job.²⁹⁷ However, he asked to transfer back to the third shift when his supervisor told him that the only job available at the second shift would require heavy lifting, which was difficult due to his medical condition.²⁹⁸ The supervisor told the plaintiff that he had to work the second shift anyway.²⁹⁹ While at work, the supervisor moved a skid of boxes and would not allow him to use a dolly to retrieve them.³⁰⁰ The supervisor then accused him of refusing to do his job.³⁰¹ His employment was eventually terminated.³⁰²

At trial, the employer's reason for firing the employee was due to his failure to obey the orders of his supervisor.³⁰³ The appellate court held however, that although the case is close, "[t]he evidence certainly supports a conclusion that the supervisor . . . was arbitrary in moving the skid and in forbidding [the plaintiff] from using the dolly to move the boxes."³⁰⁴ In addition to discrediting the employer's proffered reason for the decision, the employee presented evidence of a derogatory remark about age made by another super-

ployees for many years, even if hiring uniformly favors whites over blacks."); Lamber, *supra* note 20, at 582-83 (noting that upon doing statistical analysis, an employee should "attempt to rule out all plausible alternatives," but that it is difficult when "subjective judgment or discretion by the decisionmaker is permissible").

292. 964 F.2d 723 (8th Cir. 1992). For a further discussion of the *Williams* case, see *supra* notes 102-13 and accompanying text.

293. *Id.* at 725.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 726.

303. *Id.*

304. *Id.* at 727.

visor.³⁰⁵ The Eighth Circuit held that although the employee did not "submit a direct evidence theory," this remark was direct evidence of discriminatory intent and could be an independent basis upon which the jury could have found pretext.³⁰⁶

At first glance, the Eighth Circuit's decision gives the employee some hope. This hope, however, may be unwarranted. Given that most discrimination is not overt, the chances of an employee having evidence of derogatory comments seems slim. While the Eighth Circuit found that a derogatory remark directed at a protected class was enough to establish pretext for discrimination, the Eighth Circuit admitted in its opinion that it was operating under a pretext-only theory;³⁰⁷ the theory which was rejected in *St. Mary's*.³⁰⁸ Similarly, Justice Scalia's dissenting opinion in *Carter* is evidence that he would not find one derogatory remark sufficient to establish discriminatory motive³⁰⁹ and would probably overturn the jury's verdict for that reason. Thus, while attempting to eliminate confusion regarding the allocation of proof in discrimination cases, the decision in *St. Mary's* creates confusion over the requisite amount of proof sufficient for an employee to show "direct" evidence of discriminatory intent.

The question of what constitutes "sufficient" proof is presumably left open for the lower courts to resolve and will be fashioned as jury verdicts are appealed and either overturned or upheld. While Justice Scalia appears receptive to the fact that an ex-employee may become hostile to his former employer, and refuse to testify on the employer's behalf,³¹⁰ he does not seem sympathetic to the employee who must come forward with some evidence such as the testimony of other co-employees regarding the employer's alleged wrongdoing. It is not rational to assume that employees, especially those who have few alternate employment opportunities, will be ready and willing to testify against their employer. Thus, even where there has been overt discriminatory conduct on the part of the employer, the

305. *Id.* at 728. The remark, which was made to the plaintiff's supervisor, questioned what the supervisor was doing "with an old man carrying the boxes anyway?" *Id.*

306. *Id.*

307. *See id.* (rejecting the pretext-plus theory).

308. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747-50 (1993), *vacated*, 2 F.3d 264 (8th Cir. 1993).

309. *See supra* notes 132, 279-82 (discussing Justice Scalia's dissent in the *Carter* case).

310. For a description of the factual scenario from which Justice Scalia posits this hypothetical, see *supra* notes 175-79 and accompanying text.

employee may face considerable obstacles to getting the evidence on court record.

In light of the difficulty in securing "direct" evidence of discrimination, the potential exists for the inquiry into the employer's intent to amount to little more than the meaningless recitation of a legitimate nondiscriminatory reason. This empty charade becomes an easily surmountable formality and is analogous to the practical effect of the approach adopted in the context of discrimination in the use of peremptory challenges in jury selection. For example, in the seminal case of *Batson v. Kentucky*,³¹¹ the Supreme Court held that the defendant can establish a *prima facie* case of racial discrimination by showing:

[first,] that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, [second,] the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate, [and third,] the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used the challenges to exclude the veniremen from the . . . jury on account of their race.³¹²

However, after the defendant has established his case, the prosecutor must merely come forward with a neutral explanation for his actions in order to sustain his use of a peremptory challenge to exclude the minority veniremen.³¹³ Just as the clever prosecutor will undoubtedly be able to articulate a neutral nondiscriminatory reason for eliminating an African-American juror from the jury panel, so will the well-advised employer be able to articulate a legitimate nondiscriminatory reason for his adverse employment decision.³¹⁴

V. IMPACT

The majority's decision in *St. Mary's* will have the effect of decreasing the number of suits filed against employers as employees will be unwilling to pay for litigation when the nature and amount

311. 476 U.S. 79 (1986).

312. *Id.* at 96.

313. *Id.* at 97.

314. Throughout its decision in *Batson*, the Court notes that the evidentiary burden used in its decisions concerning disparate treatment in the employment discrimination context is analogous to the evidentiary burden established in *Batson*. For example, the Court states, "[o]ur decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of *prima facie* burden of proof rules." *Id.* at 94 n.18.

of evidence that is necessary to prevail is uncertain.³¹⁵ Those who opt to bring a case and do not have direct evidence of discrimination will undoubtedly have their case submitted to the jury for resolution,³¹⁶ resulting in higher costs, unpredictability of outcome, and a greater consumption of judicial resources. This is a burden for employee and employer alike. Employers are concerned that their motive, although not discriminatory, will be interpreted so by juries, "which tend to be less legalistic than judges in trials, [and] may presume that a lying employer is also a discriminating employer."³¹⁷ As a result of this fear, there will be more litigation at the appellate level as courts will feel the need "to reverse juries unless the record contains direct evidence of discrimination."³¹⁸

On the other hand, some argue that it is necessary that the employee establish intent.³¹⁹ These critics are unwilling to force the employer to incur the costs of compliance with Title VII where the employee cannot establish discrimination through direct evidence.³²⁰ "A decision permitting imposition of liability, even in the absence of proof of forbidden discrimination, would raise the business community's costs of civil rights compliance to unacceptably high levels."³²¹ Thus, under this view, the decision in *St. Mary's* serves to eliminate frivolous claims and to allow the employer to exercise vast managerial discretion in employment decisions. While these may be sincere and legitimate goals, they do not come without a cost; the cost that the employee against whom discrimination has occurred will forego his right to sue under Title VII, thereby licensing the employer to continue to discriminate.

The economic balance of the parties in an employment situation is what is ultimately at stake. To maintain the integrity of Title VII,

315. Joseph M. Sellers of the Washington Lawyers Committee for Civil Rights stated, "[t]he evidence of discrimination is often subtle, and while it is hard to say how it will affect individuals, it will apply to an enormous number of cases." Joan Biskupic, *High Court Erects New Barrier to Job Bias Suits; Employees Required to Furnish Direct Evidence of Discrimination, Which Can Be Hard to Do*, THE WASH. POST, June 26, 1993, at A4.

316. See, e.g., Nardo, *supra* note 250, at 1 (stating that "the practical effect will be that cases involving indirect proof of discrimination will now be submitted to juries, who can lawfully find that the employer's proffered reason for the adverse action was a lie but, nonetheless, the employer did not discriminate"). Section 102 of The Civil Rights Act of 1991 extended the privilege of jury trials to Title VII claims. 42 U.S.C.A. § 1981a(c) (West Supp. 1994).

317. Biskupic, *supra* note 315.

318. *Id.*

319. See, e.g., Samp, *supra* note 6 (supporting this viewpoint).

320. *Id.*

321. *Id.*

we must be willing to place the cost upon the employer to document his managerial decisions, make him articulate those reasons which motivated those decisions, and then hold him accountable if those reasons are discredited. Unfortunately, the Supreme Court is not willing to make the employer bear that cost. The Court is not uncomfortable with the employer contriving reasons for its decisions and it will force the employer to endure the ritual of articulating some reason which motivated its decision.³²² But, it will not hold the employer accountable unless the employee can not only discredit both the proffered reasons and others found in the record but also present evidence of a discriminatory motivation.³²³ Thus, the burden placed upon the employee increases, the depth of discovery increases, and the cost in litigation increases. The employee is forced to discern what is in the depths of the employer's mind in hopes of securing direct evidence of discriminatory intent. As there is little guidance regarding the definition of direct evidence, the quantity and quality necessary will have to be worked out in the circuits and there is little doubt that absent Congressional action, the Supreme Court will have to contend with the issue of intentional discrimination again.

VI. CONCLUSION

The decision in *St. Mary's* makes intentional discrimination harder for the employee to prove. The employee must not only discredit all the employer's legitimate nondiscriminatory reasons that it has proffered, he must go beyond that and discredit other reasons that may have motivated the employer. He must then offer independent evidence showing that discrimination was the real reason for the employer's decision. This burden significantly undermines the purpose of the Civil Rights Act and blatantly ignores the difficulty in finding direct evidence of discrimination. As a result, suing the employer will become more costly, more time consuming, and the likelihood of prevailing will remain nebulous at best.

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322. See *supra* note 202 and accompanying text (stating that in *St. Mary's*, the Court acknowledged that the employer who offers a phony reason at the second stage may be in a better position than the one who does not offer any reason).

323. See *supra* notes 212-13 and accompanying text (stating that according to the *St. Mary's* decision, the plaintiff must not only show that the employer's reasons are false, but also that the employer intentionally discriminated).